



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

GMP:HDM
F. #2009R01065

*271 Cadman Plaza East
Brooklyn, New York 11201*

February 1, 2019

By ECF

The Honorable Brian M. Cogan
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Joaquin Archivaldo Guzman Loera
Criminal Docket No. 09-466 (BMC) (S-4)

Dear Judge Cogan:

The government submits this letter respectfully requesting additional instructions based on the defendant's summation. Specifically, the government requests the following instructions: (1) government motive; (2) a more expansive instruction on "other persons not on trial" to address the selective prosecution argument made by defense counsel; and (3) government's discovery obligations have been met.

First, the Court should give an instruction that the government is not on trial and that the jury should consider the evidence and not defense counsel's baseless and incendiary arguments about the government's motives. Throughout his summation, defense counsel attacked the government's motives and prosecution of the defendant as dishonest. Defense counsel impugned the government's use of cooperating witnesses by arguing that the government suborned perjury by its witnesses in an effort to prosecute the defendant at any cost. Defense counsel also claimed that this type of behavior is not what this country represents and that the jury should be afraid of the government, for the government may one day "come for you or your loved ones" and so you should not let the government "get away with it." Here are just some examples:

- "This isn't about justice, we are not here to do justice, this trial. This trial is about one thing and one thing only; getting Chapo. Getting Chapo. Forget fairness, forget justice, forget the law, forget the ethical obligations. None of it matters, just get Chapo. If you let them get away with it, when they come for you with this kind of garbage, when they come for you or your loved ones, don't complain. Just go quietly, because this group of prosecutors, respectfully, and their group of cooperators, know what's best for you,

even if it means looking the other way when witnesses lie to get it done.” Trial Tr. 6765 at 15-25.

- “[H]e lied under oath and the prosecutors sat there quietly, letting him lie to you again.” Trial Tr. 6765 at 12-14.
- “You’re suggesting, you’re looking at me and saying what is this guy saying is he saying the Government was in on this? Of course they were in on it. They allowed the call to be made. They allowed the call to be destroyed, the tape of it. And they allowed the criminal, Louisa Fernanda, to continue visiting. Trial Tr. 6793 at 15-20.
- “I think letting our Government, calling up the son of bin Laden on the phone to speak to his imprisoned son. All the time they’re trying to say that they’re looking for bin Laden.” Trial Tr. 6819 at 14-17.
- “They have witnesses who lie to them, cooperators. Yet they’re never going to get up in front you and tell you that their witnesses are lying under oath during this trial.” Trial Tr. 6820 at 17-20.
- “They were given the world by this government and then they lied their butts off. You heard that, too, for the Government. Don’t you think our government was above that sort of thing. . . . We watched as the witnesses lied and lied and lied under oath. Is that the country you thought you were living in? Where things like that could happen inside a courtroom in America?” Trial Tr. 6730 at 11-23.
- “Remember they sat there and – the Government sat there and didn’t utter a peep during that. It was ridiculous testimony. The ends do not justify the means. They don’t. That’s not the country I want to live in, and I don’t think it’s the country you want to live in.” Trial Tr. 6766 at 4-8.
- “This is still America, ladies and gentlemen. Does anybody care that one of them lied? Not a peep over here (referring to the prosecution table). Not a peep. Not a peep.” Trial Tr. 6759 at 24-25.¹

Given the numerous references to the government’s motives, incredulous claims about the government suborning perjury, letting their witnesses lie, inflammatory rhetoric about the government coming to “get” the jurors and their loved ones, the Court should instruct the jury that these arguments were improper, that the government is not on trial and they should only consider the evidence against the defendant in their deliberations.

¹ Given the pervasive nature of these improper arguments by defense counsel, the government’s rebuttal would not have sufficed in addressing these arguments to the jury.

Second, defense counsel claimed that the government selectively prosecuted the defendant by framing the defendant for crimes that Mayo Zambada committed and even suggested, at times, that the government is conspiring with Mayo Zambada. For example, defense counsel claimed that Mayo Zambada was the voice on the calls attributed to the defendant and the government knew this and purposefully failed to play Mayo Zambada's voice for the jury, that the government is "hiding" Mayo's voice from the jury:

[The government] had the opportunity to play Mayo Zambada's voice, you know, because he called his son, spoke to his son when he was in jail. You could have heard Mayo's voice to make sure that it wasn't the voice on the tape, right? Mayo and Chapo or Chapo and Mayo. Why not play Mayo's voice so you can cross that out? It wasn't played for you. . . .

What the point is is what the Government is hiding from you is that the voice on those tapes could be anybody. Who knows? Who knows who it could be? It could be Mayo Zambada. You heard, as I said, from Vicente, he spoke to his father. At least play the tapes so we can cross them out. Why didn't they? What's being hidden from you?

Trial Tr. 6879 at 1-6; Tr. 6880 at 4-9.

Defense counsel also claimed that an FBI agent lied under oath to the jury about the defendant being depicted in an interrogation video and that the person in the video was Mayo Zambada or anyone else but the government would have still claimed it was the defendant:

Now, with regard to the interrogation video that was played, the Government was focused on this You Tube video which has been publicly available, we learned, since March of 2012. You have seen this video a lot from the trial, but Agent Marston who has never met, seen, or heard Mr. Guzman in his life identifies him in this grainy video without any attempt to electronically enhance the image. Marston said, well, you know, the guy is Spanish-speaking, probably Mexican, he's got a black hat, Guzman's got a black hat, got a mustache -- Guzman's got a mustache. Same cap and mustache, so that's Chapo Guzman right there. Oh, my god. Who else could that be? Of course we know that there are other people that have mustaches and black hats. Mayo Zambada. Mexican, mustache, hat. It could have been the Frito Bandito and he would have blamed it on Mr. Guzman -- hat, mustache, gun.

Trial Tr. 6881 at 1-9.

Defense counsel argued that this as all in line with Mayo Zambada's plan to have a "target" put on the defendant's back and allow "Mayo Zambada [to] stay in the shadows." Trial Tr. 6884 at 4-7 (arguing, without any evidence, that Mayo Zamabada

orchestrated the defendant's escape from Altiplano Prison in 2015). Defense counsel claimed that Mayo Zambada was conspiring with the government, through cooperation, bribery and "constant contact with the Government":

It's a brilliant plan for Mayo Zambada and it has worked flawlessly for decades now despite Mayo being under indictment in America since forever. Cooperate, bribe, have constant contact with the Government, stayed free, throw someone to the Feds, cocaine keeps flowing -- yesterday, today, and tomorrow forever. Nothing changes. Even what happens in this courtroom, Mayo Zambada, the cocaine keeps flowing.

Trial Tr. 6730 at 1-8.

Defense counsel asserted the government purposely failed to capture and arrest Mayo Zambada:

Now with regard to the sticky bit of testimony from Vicente about his father, Mayo, that he gave the Government Mayo's location with the geographic coordinates of his hideouts and other places he could be to find him. His father was a fugitive and had a 5 million-dollar bounty on his head. They said the Government also had Mayo's brother and other sons in their stable of cooperators. They called Mayo when they wanted to help him speak to Vicente to get him to cooperate, maybe. Mayo's wife openly runs a business in Mexico. Mayo is still out there.

They did a quick search for Mayo Zambada. No one's home, bye. Mr. Guzman's profile was raised so high that he became the ultimate target. The one that Mexico and the United States had to have.

Trial Tr. 6727 at 3-6; Tr. 6815 at 5-14.

Finally, defense counsel claimed that the government had failed to meet its discovery obligations: "So what he did was write a letter to the Department of Justice offering to surrender. Of course, he talks about the letter, tells us what's in the letter. Guess what we didn't see? Him. The letter. Somehow it's lost. Nobody knows where it is." Trial Tr. 6861 at 1-5.

In sum, defense counsel argued, without any basis, that the United States government knowingly called and allowed witnesses at trial to lie under oath and suborned perjury, perverted justice, conspired with Mayo Zambada, intentionally hid exculpatory evidence from the jury, had an FBI agent lie to the jury about the defendant's depiction in a video and purposely failed to locate and arrest Mayo Zambada, all in an effort to frame the defendant because as defense counsel put it: "This isn't about justice, we are not here to do justice, this trial. This trial is about one thing and one thing only; getting Chapo. Getting Chapo. Forget fairness, forget justice, forget the law, forget the ethical obligations." In other

words, defense counsel is arguing that the jury should disregard the evidence in this case because the government has acted in a dishonest and improper manner: “If you let them [the government] get away with it . . . when they come for you or your loved ones, don’t complain.” This is jury nullification.

Defense counsel’s arguments were improper, inappropriate and patently misleading. The Court should instruct the jury that such arguments were improper and should not be considered, that there is no evidence in this case that the government is operating under any kind of improper motive, that the defendant is the only person on trial, and that the jury should only consider the evidence in this case as it pertains to the defendant’s guilt.

Accordingly, the government respectfully requests that the Court consider the proposed language submitted as Exhibit A in instructing the jury in this case. The proposed language includes the government’s previously submitted instructions on “discovery obligations have been met” and “other persons not on trial” and a new instruction on government motive, adapted from the Court’s instruction during defense counsel’s summation.

Respectfully submitted,

RICHARD P. DONOGHUE
UNITED STATES ATTORNEY
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

ARTHUR G. WYATT, CHIEF
Narcotic and Dangerous Drug Section
Criminal Division,
U.S. Department of Justice

OF COUNSEL:

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY
Southern District of Florida